

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF OREGON

3 AYMAN LATIF, et al., )  
4 Plaintiffs, ) Case No. CV-10-750-BR  
5 v. ) January 21, 2011  
6 UNITED STATES DEPARTMENT OF )  
7 JUSTICE, Eric H. Holder, Jr., )  
8 Attorney General, et al., )  
9 Defendants. )  
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TRANSCRIPT OF PROCEEDINGS

(Oral Argument)

BEFORE THE HONORABLE ANNA J. BROWN, DISTRICT JUDGE

COURT REPORTER: AMANDA M. LeGORE, RDR, CRR, FCRR, CE  
U.S. COURTHOUSE  
1000 SW Third Avenue Suite 301  
Portland, OR 97204  
(503)326-8184

1 APPEARANCES:

2 FOR THE PLAINTIFFS: BEN WIZNER  
3 NUSRAT JAHAN CHOUDHURY  
4 American Civil Liberties Union  
5 Foundation  
6 125 Broad Street, 18th Floor  
7 New York, NY 10004  
8 (212)519-7876

9 KEVIN DIAZ  
10 ACLU  
11 PO Box 40585  
12 Portland, OR 97240  
13 (503)227-6928

14 STEVEN WILKER  
15 Tonkon, Torp, LLP  
16 888 SW Fifth Avenue, Suite 1600  
17 Portland, OR 97204  
18 (503)802-2050

19 FOR THE DEFENDANTS: DIANE KELLEHER  
20 Department of Justice  
21 Civil Division  
22 Federal Programs  
23 PO Box 884  
24 Washington, DC 20044  
25 (202)514-4775

AMY ELIZABETH POWELL  
U.S. Department of Justice  
Civil Division  
20 Massachusetts Avenue NW  
Suite 7322  
Washington, DC 20010  
(202)514-9836

1 (Friday, January 21, 2011; 1:30 p.m.)

2  
3 P R O C E E D I N G S  
4

5 THE COURT: I apologize in advance. I have a cold,  
6 and if I need to interrupt your presentations with coughs, it's  
7 not intentional.

8 We are here for argument on the Motion to Dismiss the  
9 Government defendants filed in the case of Latif versus Holder,  
10 which is Civil No. 10-750.

11 Counsel, would you all please introduce yourselves,  
12 since I'm not sure I've had the pleasure.

13 MR. WILKER: Your Honor, Steven Wilker for the  
14 plaintiffs. With me are Kevin Diaz of the ACLU of Oregon,  
15 Nusrat Choudhury, and Ben Wizner of the National ACLU, who will  
16 be handling the argument today.

17 THE COURT: Mr. Wizner will be?

18 MR. WIZNER: I will. And Ms. Choudhury -- if you hear  
19 argument on the Motion to Strike, Ms. Choudhury will speak to  
20 that. And I will speak to the Motion to Dismiss, your Honor.

21 THE COURT: All right. Good afternoon.

22 MS. KELLEHER: Your Honor, Diane Kelleher and Amy  
23 Powell on behalf of the defendants. We're both from the  
24 Department of Justice. And I will be addressing Motion to  
25 Dismiss, and Ms. Powell will be addressing the Motion to

1 Strike.

2 THE COURT: All right. Before we get to those  
3 arguments, I need help understanding the nature of the claim or  
4 claims the plaintiffs seek to bring, and I think you can  
5 understand why.

6 The Court has explicit precedent it must follow from  
7 the Ninth Circuit decision in **Ibrahim**. I am struggling to  
8 parse the decision that does control my view of my ruling on  
9 issues that are raised in this case.

10 And I'm trying to understand how that decision applies  
11 to what it is the plaintiffs are purporting to include in their  
12 complaint.

13 One of the problems is that the plaintiffs' complaint  
14 does not comply with Rule 8.

15 It is not a plain and concise statement of the facts  
16 or the elements of a claim. And plaintiffs need to file an  
17 amended complaint at some point, and I'll direct you when,  
18 because there is not any way this complaint, in the form  
19 presented, can be litigated according to the rules of  
20 procedures. It is an evidentiary recitation of a number of  
21 experiences the plaintiffs have encountered.

22 That's not how one writes a complaint for relief in  
23 federal court.

24 I can't even tell if you're suing under Section 1983  
25 or some other gateway. I don't know what the basis is for you

1 to be in court in the first instance, because I can't tell.  
2 You're alleging a claim for attorney -- for attorney fees in  
3 your prayer. I can't tell where that arises.

4 I think it is necessary, before the Court is expected  
5 to analyze whether the plaintiffs have stated a claim or  
6 whether there's jurisdiction, for the plaintiffs to do the work  
7 necessary to ensure that, as presented, the complaint or an  
8 amended complaint actually alleges plainly and concisely the  
9 elements of a claim.

10 There are 90-plus pages in the First Amended  
11 Complaint. 86 of them go to reciting evidence. And then we  
12 get to a section called claims, but I'm not even told what they  
13 are, and I'm not told what structure plaintiffs are invoking in  
14 order for there to be an analysis in the first instance. So I  
15 would like, first, to start with giving the plaintiffs an  
16 opportunity to explain to me what is the gateway you're using  
17 to be in federal court.

18 Is this intended to be a Section 1983 claim? A **Bivens**  
19 claim against the federal actors? What is it?

20 A breach of a constitutional right is ordinarily  
21 presented in the form of a Section 1983 claim or in the section  
22 of some statutory claim that's invoked: Title VII, the ADA.

23 I don't see any orientation in this complaint. Maybe  
24 I'm missing it. But I -- I really need foundation before we  
25 can get to the loftier issues I know you're eager to discuss.

1 MR. WIZNER: First and foremost, your Honor, the claim  
2 seeks only -- the lawsuit seeks only injunctive and declaratory  
3 relief. So it's most certainly not a **Bivens** claim. There is  
4 no claim for damages included in this lawsuit.

5 And the basis for jurisdiction is the Administrative  
6 Procedure Act, which is cited in the complaint as a basis for  
7 jurisdiction. And we allege that defendants' actions in  
8 preventing our clients from boarding commercial aircraft and by  
9 thereafter not providing a constitutionally adequate process  
10 for them to remove themselves from Government watch lists  
11 violates both the APA and the due process clause of the  
12 Constitution --

13 THE COURT: It's the due process clause part that  
14 causes me concern because, when a person comes to federal court  
15 to allege the violation of a constitutional right generically,  
16 that is typically framed as a Section 1983 claim or a **Bivens**  
17 claim. A claim against a state or a federal actor that a  
18 person's constitutional rights have been violated.

19 And so I'm -- I'm struggling, when you get to this  
20 undefined due process right, to understand the context in which  
21 I'm supposed to evaluate the sufficiency of the claim.

22 MR. WIZNER: Your Honor --

23 THE COURT: I get that an APA claim is an APA claim.  
24 One has to have a procedure, and then one goes through an APA  
25 analysis.

1 But when you go beyond that to say, And we have a  
2 federal constitutional right to this or that or the other  
3 thing, and the defendants are depriving us of that right, there  
4 needs to be a procedural vehicle, doesn't there?

5 MR. WIZNER: Well, your Honor, the APA can in fact be  
6 a procedural vehicle for the litigation of our constitutional  
7 claims, as well as of our statutory claims. And I'm just  
8 looking at what else we've invoked.

9 THE COURT: Well, this is the problem with the  
10 complaint.

11 As I say, at 90 pages, it is not a plain and concise  
12 statement of the facts. It is not an articulation that says,  
13 plainly, plaintiffs are invoking the jurisdiction of this court  
14 under the Administrative Procedures Act to redress the  
15 following and, in so many words, state the claim.

16 MR. WIZNER: And, your Honor, with respect to the  
17 length of the complaint, perhaps the majority of those factual  
18 allegations were relevant to claims that have since been  
19 resolved in connection with our preliminary injunction.

20 So it's very likely --

21 THE COURT: So imagine -- imagine a clean slate.

22 And imagine you were telling me what the allegations  
23 of plaintiffs' complaints were, in a plain and concise way.

24 What would you tell me?

25 MR. WIZNER: The allegations of this complaint are

1 precisely what I just said, your Honor. That -- that  
2 plaintiffs have a constitutionally protected liberty  
3 interest -- several liberty interests that have been  
4 identified: In being free from unconstitutional stigma, in  
5 being able to travel without undue restrictions, in  
6 nonattainder. And that the Government's having placed them  
7 into this federal terrorism watch list, without giving them any  
8 constitutionally adequate process for removing themselves,  
9 violates their rights under the Fifth Amendment and the  
10 Administrative Procedure act.

11 THE COURT: So at page 87 of the First Amended  
12 Complaint, under something you call a count for procedural due  
13 process, the use of the nomenclature "counts" is also quite  
14 confusing in the way you've styled this. But let's just get to  
15 paragraph 384.

16 It is alleged plaintiffs are entitled to a legal  
17 mechanism that affords them notice and an opportunity to  
18 contest their inclusion on terrorist watch lists.

19 Plaintiffs are entitled to a legal mechanism that  
20 affords them notice and an opportunity to contest the  
21 deprivation of their liberty interests, including but not  
22 limited to the interests you've just summarized.

23 Then it's alleged defendants have violated plaintiffs'  
24 rights without affording them due process of law, and will  
25 continue to do so in the future.



1           Now, when one looks at those allegations in the  
2 context of the issue -- one of the issues raised by the  
3 defendants' Motion to Dismiss specifically, the jurisdictional  
4 limitation to have a judicial review of an order of the TSA in  
5 the Court of Appeals for the District of Columbia, it's  
6 important to me to know whether plaintiffs are alleging -- for  
7 example, in paragraph 384 -- that contesting their inclusion is  
8 an opportunity that should occur before they are placed on an  
9 alleged terrorist watch list. Because it would be much more  
10 clear what it is plaintiffs were focusing on. And it would be  
11 easier to apply **Ibrahim**, which focused -- and to distinguish  
12 the other cases we've been talking about -- which focused upon  
13 the end of the process, as opposed to the beginning of the  
14 process. So --

15           MR. WIZNER: I can clarify that.

16           THE COURT: I don't mean to be critical, but the  
17 complaint is an essential tool in trying to analyze this moving  
18 target.

19           I need you to tell me what is the process that you --

20           MR. WIZNER: Right.

21           THE COURT: -- what is the process? Where in the  
22 process does the court -- trial court's jurisdiction stop? Are  
23 you on the side of the process in terms of its continuity,  
24 where the -- a trial court might have jurisdiction to consider  
25 the issues? Or are you on the part of the continuum where it

1 is absolutely clear that only the Court of Appeals in the  
2 District of Columbia has jurisdiction?

3 Where in a continuum, then, does **Ibrahim** fall that  
4 controls me? And I can't even ask the defendants to make their  
5 argument until I know more what it is you're asserting. So --

6 MR. WIZNER: Your Honor, can I --

7 THE COURT: -- will you help me, please.

8 MR. WIZNER: I would like to answer the question you  
9 specifically raised there, which is what kind of process and at  
10 what stage are we saying that our plaintiffs have due process  
11 rights.

12 And I had thought we had been clear, and I apologize  
13 if we weren't. That we are not seeking pre-deprivation notice.  
14 We have never claimed and do not claim that individuals have a  
15 right to be notified that they are going to be placed on a  
16 watch list before they're placed on a watch list. This case is  
17 about post-deprivation notice.

18 THE COURT: So do you -- do you mean, then, in  
19 paragraph 384, to use the word "inclusion"? Or do you mean to  
20 allege there to contest their continuation?

21 Because inclusion implies the decision to include them  
22 in the first place, as opposed to -- and you've just told me  
23 you're not contesting the notion that the Government might be  
24 able to make a decision to include a plaintiff in the first  
25 instance.

1           What you want is, somewhere else along the way, a  
2 process --

3           MR. WIZNER: Right, your Honor. From the moment that  
4 an individual attempts to board a plane and is turned back, is  
5 not permitted to board the plane, when it -- essentially that  
6 person, we believe, has been put on some kind of notice that  
7 the Government has an interest in that person. From that  
8 moment we believe that due process requires a name-clearing  
9 hearing. An opportunity for that person -- preferably before  
10 the agency, if the agency has a process that meets  
11 constitutional minimums; if necessary, in the federal court, if  
12 the agency refuses to do that -- that gives that person notice  
13 of the charges and an opportunity to rebut any evidence or  
14 innuendo.

15           THE COURT: So I'm still back at paragraph 384. And  
16 I'm still confused by --

17           MR. WIZNER: By the wording.

18           THE COURT: -- what continuum do you contend --  
19 Counsel, it won't be helpful if you keep pulling on his sleeve.  
20 I've got to have his attention, please.

21           What is the continuum where the process ensues --  
22 where in the process, critical to **Ibrahim** and the statutory  
23 limitation of this Court's jurisdiction is it you contend there  
24 is room for district court jurisdiction?

25           I thought you were going to tell me you did want a

1 process before inclusion, and that's why your case is different  
2 from **Ibrahim**, and that's why this Court might have a basis not  
3 to dismiss the complaint.

4 But you've just taken that off the table.

5 MR. WIZNER: Well, we think our case is not different  
6 from **Ibrahim** but covered by **Ibrahim**, for the reason that in  
7 **Ibrahim**, the decision maker -- the person who was responsible  
8 for what we believe is the constitutional injury and is capable  
9 of providing relief -- is not the TSA. And so that there can't  
10 be an order of the TSA involved when --

11 THE COURT: But you just told me that the process you  
12 want is at the gate, is at the airport. That's what TSA is all  
13 about.

14 MR. WIZNER: No. I'm sorry, your Honor. I didn't  
15 mean that the process was at the gate. I meant, that at that  
16 point there needs to be a process, either before the agency or  
17 in a court, that is available to someone in that situation.

18 I'm a little confused by your questions about **Ibrahim**,  
19 because our belief that this case is covered by **Ibrahim** doesn't  
20 depend on this continuum question but on the core fact that  
21 here, as in **Ibrahim**, it's an entity called the Terrorist  
22 Screening Center, and not the TSA, that is capable of  
23 effectuating the relief that we seek.

24 The defendants -- sorry. The -- there are  
25 declarations submitted by the Government that concede that TSA

1 is not responsible for placing our clients on a No Fly List,  
2 and it is without authority to remove them from a No Fly List.  
3 That those decisions are controlled by the TSC, which is  
4 controlled by the FBI. That was the core holding of **Ibrahim**.  
5 And that's why we believe this Court has jurisdiction. Because  
6 at whatever point in the process it occurs, it can't be an  
7 order of the TSA.

8 But -- but --

9 THE COURT: Why can't it be an order of the TSA if  
10 what you're telling me is you want process after your clients  
11 run into trouble at the airport?

12 That's what you just told me.

13 MR. WIZNER: Right. After our clients run into  
14 trouble at the airport, they seek a place where they can turn  
15 and get relief from that trouble.

16 The Government has created a kind of mechanism that  
17 involves applying for redress to TSA and to DHS. The problem  
18 with that mechanism is that neither TSA nor DHS has any  
19 authority to provide the relief that our plaintiffs and other  
20 travelers are seeking.

21 And this is why -- again, as in **Ibrahim** -- it is  
22 another --

23 THE COURT: What do they have the authority to  
24 provide?

25 MR. WIZNER: Well, that's an excellent question. And

1 that's really a question for opposing counsel.

2           According to TSA's declarations, they receive the  
3 complaints from the travelers. They then forward them to the  
4 Terrorist Screening Center. The Terrorist Screening Center  
5 reviews the situation, consults with other Government agencies,  
6 makes a decision about whether the -- the -- the complainant  
7 should be on the No Fly List or not, reports that decision to  
8 the TSA, and the TSA then writes a letter to the complainant.

9           Now, those letters say virtually the same thing every  
10 time. They say, If there was an action that we should have  
11 taken, we took it.

12           And I don't think that there is any case cited by the  
13 Government, or in existence, in which a so-called final order  
14 of an agency, number one, was written by an agency that doesn't  
15 have authority over the issue in question; and No. 2 --

16           THE COURT: Your view of the TSA here is that it is  
17 simply a bureaucratic arm of the defendant decision makers?

18           MR. WIZNER: In this case, it is. In fact they  
19 describe themselves as a central processing point. That's in  
20 the TSA's declaration in this case. They say they are a  
21 central processing point. They relay the decision of the  
22 Terrorist Screening Center to the individuals.

23           And, again, I haven't seen any case cited by the  
24 Government anywhere where, No. 1, the letter is issued by an  
25 entity that is not the decision maker and doesn't have

1 authority over this decision; and, No. 2, doesn't take a  
2 position on the relief requested.

3 THE COURT: What did Congress mean, then -- let me try  
4 it another way.

5 MR. WIZNER: Yeah.

6 THE COURT: What did Congress mean, then, when it  
7 limited appellate review or judicial review to the particular  
8 forum identified, the Court of Appeals of the District of  
9 Columbia? What is it that Congress has authorized only that  
10 court to consider?

11 MR. WIZNER: Well, if you look at a case like **Gilmore**,  
12 the Ninth Circuit's decision in **Gilmore**, there you had a  
13 security directive of the TSA.

14 It was the TSA's own policy that the TSA promulgated  
15 and enforced and had authority to enforce on the ID  
16 requirements for boarding a plane. There was no dispute  
17 between the parties that this was a TSA security directive.

18 The No Fly List, according to **Ibrahim**, is a security  
19 directive of the Terrorist Screening Center.

20 So if those letters are orders at all -- and for a  
21 variety of reasons, we don't think that the letters that our  
22 clients got are orders, because they don't meet the criteria  
23 for being orders in the first place. But if they are orders,  
24 they're orders of the Terrorist Screening Center that are  
25 simply relayed by TSA.

1 I -- I -- I want to go back to your question about  
2 Congress. It is true, as defendants point out, that Congress  
3 did charge TSA and DHS with setting up a redress process.

4 This was the argument that the United States put  
5 forward in the **Ibrahim** case, and it's the argument that the  
6 **Ibrahim** dissent made in saying that for that reason these were  
7 orders.

8 But, again, it was the dissent. And the majority of  
9 **Ibrahim** said that the determinative point was that it was a  
10 separate Government agency that was at -- responsible for  
11 creating and maintaining the No Fly List.

12 THE COURT: What is the status of the holding in  
13 **Ibrahim**? That case is still pending?

14 MR. WIZNER: The Government might be in a better  
15 position to answer that. It is a very confusing case. Claims  
16 against lots of different parties. Some for damages, some for  
17 injunctive relief.

18 It was being litigated simultaneously in two circuits:  
19 In the Court of Appeals for the D.C. circuit and also in the  
20 Ninth Circuit Court of Appeals.

21 Some of the claims have been dismissed, some have been  
22 settled. And I don't know if there's still a pending appeal in  
23 **Ibrahim**. I think there is still a pending appeal in **Ibrahim**.  
24 But the --

25 THE COURT: So, Mr. Wizner, back to the complaint,



1 what it is you're seeking to litigate on behalf of your  
2 clients. You've clearly, in 80-plus pages of evidentiary  
3 allegations, asserted they've all encountered difficulties;  
4 either trying to travel out of the United States or to return  
5 to the United States using the airlines. And that they believe  
6 that they've been designated onto a list in some manner, by  
7 some Government action. I get that.

8           You're contending that each of your clients -- the  
9 citizens and those who are otherwise lawfully here -- have a  
10 Fifth Amendment due process right once they -- once they each  
11 become aware that they have been flagged for secondary  
12 screening or have been affirmatively designated not to fly,  
13 even though they learn that through hearsay or some other  
14 mechanism, because it seems the official vehicle is still -- if  
15 you are on the list, we've done what we're supposed to do to  
16 ensure that you're either there or not there appropriately.

17           But your contention is once they know, once they've  
18 encountered a problem, it is at that stage they're entitled to  
19 some process different from the redress process?

20           MR. WIZNER: Yes, your Honor. And I should clarify  
21 just a little bit.

22           You've described the relief we're seeking. It may  
23 well be that our clients have Fifth Amendment rights that begin  
24 at an earlier point. We recognize that the Government has a  
25 much stronger interest in not providing notice before our --

1 our people have had difficulty flying. Because it may well be  
2 that there are people on the No Fly List who are on criminal  
3 wanted lists, who -- who really have warrants out there for  
4 their arrests. And to send them a letter saying, You're on the  
5 No Fly List would be a tipoff. And that's why our lawsuit  
6 doesn't challenge that part of the No Fly List.

7 We say, once the travelers have been functionally  
8 notified, that interest really disappears. They disagree. We  
9 think it does.

10 And at that point the constitutional minimum would be  
11 a process that gives them some meaningful notice of the reason  
12 for the Government's decision that they can't board a plane,  
13 and some fair opportunity for them to rebut that evidence.

14 THE COURT: What is the APA claim, then, that you are  
15 stating?

16 Let's say for those of your clients who are actual  
17 citizens of the United States. What is the claim for relief,  
18 and what are its elements? Because I can't find them in your  
19 complaint.

20 MR. WIZNER: The -- the gravamen of the APA claim,  
21 your Honor, is that the Government's actions in preventing our  
22 clients from flying commercially and implicating various  
23 interests that we've identified, without at the same time  
24 providing them any kind of a fair process for getting out of  
25 that situation, is arbitrary and capricious.

1           And -- and that -- that is -- that's how our complaint  
2 sounds in ADA language. But it's --

3           THE COURT: In APA --

4           MR. WIZNER: Sorry. APA not ADA. That's exactly  
5 right.

6           And, again, ideally, your Honor, the result of this  
7 litigation, if the Court were to agree that the existing  
8 redress process is constitutionally inadequate, a process in  
9 which travelers are free to provide whatever information they  
10 want to the Government but are never told whether they are or  
11 are not on a list, are never given any reason whatsoever for  
12 why they may be on a list, there's no hearing before an  
13 administrative law judge -- which was one of the factors that  
14 Chief Judge Kozinski mentioned in **Ibrahim** for why it needed to  
15 be in district court.

16           But if the Court were to agree that the existing  
17 redress process were unconstitutional, ideally the agency would  
18 respond by creating a process that met those constitutional  
19 minimums.

20           It may be that in this case, if the agency were slow  
21 to do that, that kind of process would take place here, in the  
22 district court. Where if the Court agreed that our clients had  
23 a right to notice and an opportunity to be heard on this  
24 deprivation, that a procedure could be established for our  
25 clients, in this court, to do that.

1 But we certainly don't disagree with the Government,  
2 that the agency should have a chance, in the first instance, to  
3 create a process that meets those constitutional safeguards, as  
4 they do in many, many other circumstances. If an alien is  
5 going to be removed from the country, there is a hearing before  
6 an administrative law judge. Sometimes there's secret  
7 evidence, sometimes there isn't. But there -- there is a  
8 process that exists.

9 Here, we believe that the deprivation that our clients  
10 have suffered has constitutional significance. That their due  
11 process rights are being violated. And in those circumstances,  
12 the -- the redress process that the Government set up, that  
13 affords no notice, that sends the same letter to a complainant,  
14 whether that person is or is not on the No Fly List, they will  
15 get the same kind of letter. The only way they can find out if  
16 they're still on the list is by risking this injury again: The  
17 monetary and reputational harm of buying another plane ticket,  
18 going to an airport, being turned away.

19 We believe that's unconstitutional, and that under the  
20 due process clause, the agency is required to provide more  
21 process.

22 THE COURT: I'm still troubled that the complaint  
23 itself doesn't explicitly allege discrete claims for relief in  
24 an elemental way.

25 So back to my invitation to you to imagine you were

1 starting over. What would you allege? Do you have one claim  
2 for relief? Do you have more than one claim for relief? Do  
3 your clients, who have different statuses, have different  
4 claims? Why have you denominated pages 88, and on, in counts  
5 that are part of the same claim? If your -- are you making an  
6 APA claim on its own? And these are different theories for the  
7 same argument about an arbitrary and capricious governmental  
8 agency action? Or do you have a separate stand-alone  
9 constitutional Fifth Amendment due process claim that you're  
10 making? In which case, I continue to think that's a claim that  
11 needs a vehicle, like a Section 1983 claim, or something.

12           You don't just throw constitutional language into a  
13 complaint. You need a vehicle for relief, and you need a basis  
14 to recover attorney fees, and so forth.

15           So tell me what -- what is the outline of your -- of  
16 the elements of your claim or claims? How many of them are  
17 there? How many of your plaintiffs fit under which one? So  
18 that I can try to understand what the Government's dismissal  
19 arguments are against your theories, framed that way.

20           MR. WIZNER: Your Honor, I think the case is  
21 simplified at this point because of the resolution of our  
22 claims under the Fourteenth Amendment and under the Immigration  
23 and Nationality Acts, by virtue of the Government providing the  
24 relief that we requested, which was the repatriation of those  
25 clients, subject to suitable screening procedures.

1           And although the Government did, once again, press a  
2 defense against those claims in its Motion to Dismiss, it may  
3 very well be that those claims are moot. And that if we were  
4 to amend at this time with these plaintiffs, we would not be in  
5 a position to raise those claims. And that simplifies it  
6 because the remaining plaintiffs in the case are all making  
7 precisely the same claims.

8           THE COURT: Claim or claims?

9           MR. WIZNER: Claims.

10          THE COURT: All right. Delineate them, please.

11          MR. WIZNER: Yes. So they are making constitutional  
12 claims, a right to procedural due process under the  
13 Constitution. And if your Honor is correct, that we did not  
14 frame these through the appropriate jurisdictional vehicle --

15          THE COURT: I don't know or not.

16          I just don't see -- I don't see how the door's been  
17 opened. I just see a lot of allegations, and -- and a  
18 conclusion.

19          We all know, under **Iqbal** and otherwise, that the  
20 complaint has to be plausible. There have to be facts  
21 concisely stated that point to a right to recover some kind of  
22 relief.

23          And I can't start analyzing a Motion to Dismiss,  
24 except maybe the jurisdictional arguments. And I surely won't  
25 be able to get to all of these summary judgment arguments that

1 have been forced so quickly until -- until there is a defining  
2 of what is the precise claim, what are the precise claims, and  
3 what are their elements, such that I can look at this from an  
4 analytical perspective.

5 So I'm inviting you to tell me each claim that you  
6 think is either there explicitly or implicitly, and what are  
7 the elements of each such claim.

8 MR. WIZNER: Okay. So, your Honor, the -- the basis  
9 for the procedural due process claim is that our clients have  
10 identified various liberty interests, the deprivation of which  
11 trigger -- trigger a right to notice and an opportunity to be  
12 heard. And I do think that we spelled out what those liberty  
13 interests were --

14 THE COURT: Yes. Yes, you have.

15 MR. WIZNER: -- properly in the complaint.

16 THE COURT: Well, I don't know if it's properly. But  
17 you've alleged that your clients have the liberty interests,  
18 including but not limited to the interests in traveling,  
19 freedom from false stigmatization, and nonattainder due to  
20 their inclusion.

21 MR. WIZNER: Right. And the relief that is requested  
22 through that claim is a process that -- as I've said like a  
23 broken record and I apologize -- affords them meaningful notice  
24 and --

25 THE COURT: Meaningful notice of what?

1 MR. WIZNER: Meaningful notice of the basis for the  
2 deprivation.

3 In short, they have a right to know why. And as your  
4 Honor is familiar, in other circumstances there may be  
5 procedures that are necessary. Maybe they'll get unclassified  
6 summaries of the evidence that the Government is relying upon.

7 It may not be that they get to open up the  
8 Government's files and see everything that's inside.

9 But, at a minimum, they need to know why the  
10 Government is not allowing them to fly. And they need to know  
11 that well enough so that they have an opportunity to say  
12 either, That's not me, That's not true, or I can explain that.

13 THE COURT: All right. That's one claim or more than  
14 one claim?

15 MR. WIZNER: No, it's one claim. It's a procedural  
16 due process claim.

17 THE COURT: Are there other claims?

18 MR. WIZNER: Yeah. There's an independent claim under  
19 the Administrative Procedure Act on the basis that the same  
20 challenged conduct is arbitrary and capricious and contrary to  
21 constitutional rights, which the APA permits.

22 THE COURT: All right. Are there any other claims  
23 that should have been explicitly laid out or are implicitly  
24 laid out here besides your procedural due process claim and the  
25 APA claim you've just identified?



1           MR. WIZNER: The only other claims that were laid out  
2 are ones that probably are not live at this stage of the  
3 litigation, for --

4           THE COURT: So for purposes of our discussion today,  
5 is it safe for me to assume we have two claims for relief on  
6 the table?

7           MR. WIZNER: Yes.

8           THE COURT: Okay. So let's talk about this procedural  
9 due process claim.

10           You're indicating that at the time one of your clients  
11 receives a red light at the airport, they've gone, they can't  
12 get their boarding pass, or they're pulled aside in screening  
13 or in some manner. They're not allowed simply to step through,  
14 to get to the gate, to get on an aircraft. Somewhere in that  
15 process, your clients are entitled to notice why they've been  
16 held aside, and an opportunity to respond?

17           MR. WIZNER: Correct. Before some kind of neutral  
18 decision maker.

19           And typically this would take place within the agency,  
20 but the agency has not yet set up a process that permits that.

21           THE COURT: And how does that contention of your  
22 presumed right -- your client's right to a hearing there or in  
23 some manner that allows them to -- to proceed with their  
24 otherwise fundamental right to travel, how does that compare to  
25 the specific process that the statute refers to as within the

1 exclusive jurisdiction of the District of Columbia Court of  
2 Appeals?

3 MR. WIZNER: Well --

4 THE COURT: You're saying that when your client says,  
5 Why, I'm entitled to know why, that whatever happens after that  
6 is not in any way an order of the TSA that is subject to that  
7 exclusive jurisdiction.

8 MR. WIZNER: The question under that statute is  
9 whether our clients have disclosed an interest in an order of  
10 the TSA.

11 So the first question is what is that order. The --

12 THE COURT: Is there an order?

13 MR. WIZNER: Yeah. First of all, is there an order?  
14 What is it that order might be?

15 The Government contends that that order is the letter  
16 that is sent by an arm of TSA to our clients and others.

17 THE COURT: After the fact?

18 MR. WIZNER: After they have submitted applications  
19 for administrative redress.

20 So the way that it occurs and the way that we  
21 described in our complaint, is that someone who has been turned  
22 away from a flight may then appeal to the Department of  
23 Homeland Security for redress through a process that has been  
24 set out.

25 Typically they'll go to a Government-run website.

1           And there they're invited to submit any information  
2 they want. The problem is they're not told what they should  
3 submit that evidence in response to, and they don't know what  
4 it's about.

5           All they know is that they weren't allowed to board a  
6 plane. They haven't been told whether or not they're on a  
7 watch list. They have to guess at that. And the Government  
8 says that the vast majority of people who in fact do turn to  
9 this mechanism are not on Government watch lists. But they  
10 have no way of knowing that. And they still don't know that  
11 after they get a response, because the letter says, We've  
12 reviewed this. If we should have taken an action, we did.  
13 And -- and that's really all it says.

14           And so we submit that someone who receives one of  
15 those letters is in precisely the same position after he  
16 received it than he was in before he received it.

17           He either is or is not on a Government watch list. It  
18 takes no definitive position, as the law requires.

19           So the Government's argument is this case belongs in  
20 the Court of Appeals, because that letter is an order, and we  
21 should appeal from that order to the Court of Appeals.

22           THE COURT: I think there's a precursor to that logic.

23           That the process that your clients are entitled to is  
24 the redress process. And from the redress process comes a  
25 decision in the form of this nondescript letter that itself can

1 then be appealed.

2 MR. WIZNER: It could be, your Honor.

3 The Government surely could have set this up  
4 differently; in a way that would make a letter like that an  
5 order.

6 But what they would have to do is set up a process  
7 where TSA was actually the decision maker. Where TSA had  
8 authority over the decision.

9 Where -- we believe, for it to be constitutional,  
10 where our clients had a chance to present evidence. Not just  
11 randomly, but in response to allegations. And then the letter  
12 would have to deliver the outcome. It would have to tell the  
13 person, This is our definitive statement of the legal question.

14 Now, the -- the question is, Can I fly or not? But as  
15 the Government's affidavits make clear, DHS trip letters do not  
16 take any position on whether the petitioner can or cannot fly.

17 And that's a categorical rule. They don't sometimes  
18 say you can fly and sometimes not. They simply don't say  
19 anything.

20 And so, again, someone at the end of this process, we  
21 believe, is in precisely the same situation he was in before.

22 If you look at the other cases interpreting that  
23 jurisdictional provision, it's -- it's -- it's a parachute club  
24 that's complaining that new FAA rules say they can't jump from  
25 where they want to jump. And can you imagine a letter from the

1 FAA that said, We've reviewed your complaint, and either you  
2 can jump or you can't. But -- but really, for it to be  
3 equivalent here, that letter would have to come from an entity  
4 that really wasn't a decision maker.

5 So our belief is that **Ibrahim** is controlling precisely  
6 for the reason that it is a separate government entity,  
7 altogether, that is calling the shots.

8 THE COURT: So as you've explained your two operative  
9 claims to me this afternoon -- and I thank you for tolerating  
10 my persistence there -- as you've explained them, your argument  
11 is that the -- those claims cannot be dismissed for lack of  
12 jurisdiction because none of them -- neither of them implicate  
13 an order of the TSA that is being submitted for judicial  
14 review?

15 MR. WIZNER: That's correct, your Honor.

16 And we would go beyond that and say that the  
17 jurisdictional statute doesn't contemplate the kind of  
18 challenge that we're bringing to the validity of the existing  
19 redress process itself.

20 That -- that if you look at the language of the  
21 statute, what it contemplates is an appeal from that order; not  
22 an attack on that system.

23 And, you know, we believe under **Mace v. Skinner** and  
24 under **Ibrahim** that this case properly belongs in the district  
25 court.

1 I mean, one of the other points that Judge Kozinski  
2 made in **Ibrahim** is that shouldn't a case like this be in front  
3 of a court that can take evidence?

4 And we don't see how we can litigate our due process  
5 claims without evidence. It may be we can litigate some of  
6 them without discovery, but that's only because the parties are  
7 able to jointly stipulate to facts. The Court would still have  
8 to do fact-finding. And it may be that when we get to the  
9 individual situations of our clients that there will be  
10 discovery. And it's hard to imagine what the Court of Appeals,  
11 in the Ninth Circuit or the D.C. Circuit would do if presented  
12 with these claims. What kind of mechanisms it could set up.

13 I think that one way of looking at this is that, you  
14 know, the cases that belong in the D.C. Circuit are there --  
15 are those that involve, really, review of an administrative  
16 record, that allows the court simply to look at what has been  
17 produced and make its ruling.

18 And it's hard to see how if we filed this kind of  
19 complaint or a streamlined version of it, your Honor, in the  
20 Court of Appeals, that that court would be set up to resolve  
21 the kinds of constitutional issues that we've raised here.

22 THE COURT: All right. Well, I appreciate those  
23 orienting comments.

24 I think, now, I would like to hear the Government's  
25 argument in support of the Motion to Dismiss for lack of

1 subject matter jurisdiction, in that context. And then, of  
2 course, you'll have a chance to speak again on that issue.

3 MR. WIZNER: Thanks, your Honor.

4 THE COURT: Thank you.

5 Counsel.

6 MS. KELLEHER: Yes, your Honor. In our view, this  
7 case is different from **Ibrahim** because in that case essentially  
8 Ms. Ibrahim's claim was backward looking. It was looking  
9 backwards at the initial decision to place her on the No Fly  
10 List. And she explicitly disclaimed any challenge to the  
11 redress procedures that were available at that time.

12 In this case -- in this case, as Mr. Wizner's just  
13 explained the claims, they're forward looking. It's you've  
14 encountered this travel difficulty. And your next question is,  
15 I think this happened to me because I'm on a Government watch  
16 list. How do I get off?

17 And the answer to that question is there is a redress  
18 procedure currently available, administered by DHS and TSA, at  
19 Congress's explicit command. So that process, the DHA TRIP  
20 process, is essentially the gravamen of the plaintiffs' claims  
21 in this case.

22 In order for the Court to award the relief that they  
23 are seeking, they need to persuade your Honor that the DHS TRIP  
24 process is itself deficient and unlawful. And TSA is the  
25 entity that is charged with providing redress to persons who

1 allege that they were delayed or denied boarding.

2 And when they issue -- so Mr. Wizner's correct that  
3 individuals who encounter travel difficulties of any kind --  
4 and that's part of the reason DHS TRIP is described as a  
5 central processing point. So you may have been denied  
6 boarding. A T -- TSA employee may have been rude to you. You  
7 may have lost your bags. Any of those situations, you're  
8 directed to file a complaint with DHS TRIP, and it will  
9 essentially investigate your complaint.

10 Now, the Government's never contended, your Honor,  
11 that this process is entirely TSA, entirely DHS. It does  
12 involve other agencies, but it doesn't change the fact that  
13 even though TSA's letter may be in part based on the work of  
14 other agencies, the letter itself is still a final order.

15 The plaintiffs don't --

16 THE COURT: How? How is the letter a final order?

17 MS. KELLEHER: I would say, your Honor, that it  
18 expresses that the complaint has been finally resolved. That  
19 to the extent action can be taken, it was. There's nothing  
20 further left to do.

21 The letter is very different than those that are  
22 involved in the cases cited in the plaintiffs' brief, such as  
23 in **Air California**, or in the **Bensenville Village** case out of  
24 the D.C. Circuit. In those cases, in **Air California**, you had a  
25 letter from the FAA to the Orange County board of supervisors



1 that says, If you do not open up the John Wayne airport to  
2 other carriers, we may take the following types of disciplinary  
3 action against you. So there was an if. It was contingent on  
4 further action.

5 In the **Village of Bensenville** case, you had a letter  
6 of intent from the FAA suggesting, hey, maybe we'll have some  
7 additional federal funds as you expand the O'Hare airport for  
8 an eight runway. But we're not committing to those funds, and  
9 basically this is just a way for you to get some private  
10 development money to assist with your airport expansion.

11 So there was no commitment. And the essentially the  
12 real commitment would have come much later in the process, when  
13 the city of Chicago would have actually applied for that  
14 funding.

15 So in both of those cases, there was a clear sense  
16 that there was still further action to be taken, and that the  
17 agency's position was conditional, it was tentative, it was  
18 nonfinal. These letters -- the DHS letters, while I certainly  
19 concede they do not contain as much information as Mr. Wizner  
20 thinks they should, there is nothing tentative and there is  
21 nothing conditional about them. They tell the complainant that  
22 their case has been reviewed. That there is an administrative  
23 record that says records have been reviewed. So this DHS TRIP  
24 process is very distinct from the concern that Judge Kozinski  
25 articulated in **Ibrahim**, because there is an administrative

1 record.

2           And in fact, your Honor, the Government filed an  
3 example of the certified index of record from the **Kataroff**  
4 (phonetic) case, which is currently pending in the D.C.  
5 Circuit. Where Mr. Kataroff received a TRIP letter, waited for  
6 the 60 days for it to become final, and filed a petition for  
7 review in the D.C. Circuit. And the Government has then come  
8 forward with the record that will support its decision.

9           So in that sense we clearly have that record, which is  
10 the basis for the agency's action. And the letter itself says  
11 that a final -- the complaint has been finally resolved.

12           So I think if you have a record and you have the  
13 agency's expression of finality, of a finding, that is a final  
14 order of TSA.

15           And the claims that Mr. Wizner and his clients wish to  
16 bring about the TRIP process, generally, I think they would be  
17 entirely appropriate in the Court of Appeals.

18           In the **Gilmore** case, Mr. **Gilmore** was very unhappy  
19 about the requirement that he show identification in order to  
20 travel from California to Washington.

21           And he also was unhappy about the -- the sort of plan  
22 B in that situation, which was for him to go through secondary  
23 screening.

24           He didn't like either of those options, and he sued  
25 essentially saying that he thought they were unlawful.

1           The Ninth Circuit held that this was a challenge to  
2 the final order of TSA, the directive that identification be  
3 required, absent an agreement to secondary screening. But it  
4 also entertained his due process, his vagueness, and his  
5 overbreadth challenges to those same security directives.

6           So I think in that --

7           THE COURT: Just because the Court of Appeals  
8 entertained them, didn't mean another court couldn't.

9           MS. KELLEHER: Yes, your Honor.

10          THE COURT: I'm not sure that helps me in sorting  
11 through your jurisdictional argument, which is this Court does  
12 not have subject matter jurisdiction at all.

13          MS. KELLEHER: Yes, your Honor. I should phrase it in  
14 terms of its relationship to the final order.

15          That essentially if this case really boils down to a  
16 claim, DHS TRIP is inadequate. It's not good enough. It  
17 doesn't tell us what we want to know. It doesn't give us  
18 enough transparency. We want a chance to be -- we want this  
19 process brought forward, to be more transparent and open.

20          Essentially, they wrote -- the letter should say more,  
21 and the process should be more open to them. Those to me seem  
22 they are -- they are tied to this letter that they get, which  
23 is the consummation of the current redress process.

24          THE COURT: And this differs from Chief Judge  
25 Kozinski's analysis in **Ibrahim** how?

1 MS. KELLEHER: Yes, your Honor. I'll do my best to  
2 distinguish it.

3 At first I'd say that in **Ibrahim**, what the Ninth  
4 Circuit said was that the district court retained original  
5 jurisdiction over **Ibrahim**'s claim regarding placement on the No  
6 Fly List. So I would say this is not really, as Mr. Wizner  
7 just explained, a claim about incorrect placement. It's a  
8 claim about inadequate redress procedures. So I would say  
9 that's a first distinction.

10 Second, redress is specifically an obligation that  
11 Congress has given to TSA and DHS. And although --

12 THE COURT: Is there something different between the  
13 redress opportunity that is the subject of the statute and the  
14 due process rights the plaintiffs are seeking to vindicate  
15 here?

16 MS. KELLEHER: No, your Honor. I think essentially,  
17 DHS TRIP is designed, at this point, to be the Government's  
18 attempt to balance an individual's interests in traveling with  
19 the Government's right to pre-screen passengers who wish to  
20 board commercial aircrafts either in, to, or from the United  
21 States.

22 So that -- the DHS TRIP process is designed to balance  
23 those interests and it's administered by TSA. And although it  
24 involves other agencies, we certainly don't deny that.

25 We've never said it was a 100 percent TSA process, and

1 in fact I think that would actually be in contravention of how  
2 Congress has asked for prescreening to occur.

3 We have set up the centralized watch lists to  
4 encourage information sharing among our executive branch  
5 agencies, and it would really make no sense for TSA to ignore  
6 the conclusions or work of another agency simply to restart its  
7 own work.

8 So essentially when --

9 THE COURT: But if there is a part of process then, in  
10 an agency other than TSA -- which is the subject of the limited  
11 jurisdiction statute --

12 MS. KELLEHER: Yes, your Honor.

13 THE COURT: If there's a part of a process involving a  
14 different agency, how could that jurisdictional limitation be  
15 interpreted to preclude judicial review of that other agency's  
16 activities?

17 MS. KELLEHER: I wouldn't say that it would  
18 essentially preclude it, your Honor. It would simply --

19 THE COURT: By a regular old district court?

20 MS. KELLEHER: By a regular old district court; where  
21 I am always, your Honor. Unlike Mr. Wizner, we have a civil  
22 appellate staff. So I actually never get to go to the  
23 appellate courts.

24 But I would say in that case, your Honor, the work --  
25 the other -- the involvement of the other agencies, then, just

1 becomes part of that process.

2           Essentially, the TSA letter, at the end, is the  
3 consummation of the person's attempt to get redress. And it  
4 involves TSA, TSC, and other agencies.

5           But the letter is sort of the ultimate outcome of that  
6 process.

7           And I don't think TSA's just sort of the bureaucratic  
8 messenger. Because, first of all, they're part of the process  
9 as well. But, second, it's ultimately TSA that if you're on  
10 the No Fly List -- and as your Honor knows, we don't confirm or  
11 deny whether anyone is on the list. But if someone is on the  
12 list, they seek redress and they're successful, the decision is  
13 made to remove them from the list. They'll receive a letter  
14 from TSA which won't actually tell them that, but behind the  
15 scenes TSA will then remove them based on the TSA secure fly  
16 database. They will now be able to obtain a boarding pass.

17           THE COURT: Whose decision is that?

18           MS. KELLEHER: I think it's ultimately -- it's TSA's  
19 decision, based on the work of other agencies and TSA.

20           I think it's sort of this entire process of  
21 information sharing that goes on. And TSA essentially includes  
22 that decision when it communicates it to the individual. And  
23 it's also reflected, to the extent the person is successful --

24           THE COURT: What was it Chief Judge Kozinski was  
25 saying, then, in reversing the district judge on the

1 jurisdictional question in **Ibrahim**? What was it he was saying  
2 the district court had jurisdiction to determine?

3 MS. KELLEHER: He said that -- I believe I had -- the  
4 precise quote is, Her APA claim regarding placement of her name  
5 on the No Fly List.

6 So in this case we would say we're distinct. The  
7 continuum that your Honor referred to earlier, this is  
8 essentially a forward-looking claim as, this has happened to  
9 me. I've had this travel difficulty. I would like to have  
10 this not happen again. I would like to get off this list that  
11 I think I'm on.

12 Ms. Ibrahim's essentially was a backward-looking claim  
13 which is nobody should have put me there in the first place.

14 THE COURT: What is the status of the **Ibrahim** case?

15 MS. KELLEHER: I believe, your Honor, it is as  
16 Mr. Wizner has suggested. It is a somewhat protracted case.  
17 But I believe Ms. Ibrahim is still currently appealing the  
18 district court's decision to dismiss the federal defendants on  
19 standing. So I think that is the live issue in the Ninth  
20 Circuit.

21 I don't precisely know what's going on in the --

22 THE COURT REPORTER: I need you to speak slower,  
23 please.

24 THE COURT: Way slower.

25 MS. KELLEHER: I apologize. It's a bad habit.

1 I believe the orders on discovery were vacated. So  
2 they're no longer live. And then the other defendants settled  
3 out.

4 THE COURT: But we don't know, yet, whether there will  
5 be review of Chief Judge Kozinski's authored panel decision?

6 MS. KELLEHER: I think that decision is final, your  
7 Honor. I believe the Government sought en banc but was not  
8 successful.

9 So essentially --

10 THE COURT: But when the case is back before the  
11 appellate court after a final decision, are you saying the  
12 Government has foreclosed the opportunity to appeal that  
13 decision?

14 MS. KELLEHER: You know, I am uncertain, your Honor.  
15 Perhaps --

16 THE COURT: Probably you don't want to say that one  
17 way or the other.

18 I'm trying to understand how final that decision is.  
19 Clearly it is a published decision, and I am bound by it. I'm  
20 also trying to understand what it means, to apply it here.  
21 But --

22 MS. KELLEHER: I think when --

23 THE COURT: Your view is that it's -- it is not in  
24 play anymore?

25 MS. KELLEHER: That's my understanding. And I believe



1 when the Ninth Circuit takes up the issue that was remaining,  
2 it had to do with her standing, essentially. And so it was  
3 limited to whether or not she had sufficiently discussed future  
4 plans, and that sort of thing.

5 But I don't -- I don't think this part of the **Ibrahim**  
6 case -- at least as we understand it -- is still in play.

7 So we would argue essentially, your Honor, that  
8 we're -- since we're on the redress side and there's a specific  
9 obligation for TSA, and we know from the records -- from the  
10 DHS TRIP letters and the declarations we've submitted to your  
11 Honor, there is an administrative record.

12 So Chief Judge Kozinski's concern that the appellate  
13 court would be sort of at sea in trying to address the merits  
14 of -- review the merits of a decision is unfounded here, not  
15 only because the DHS TRIP letters say there's a record but  
16 because we've even submitted to your Honor an index of such a  
17 record in a case involving a petition for review of a DHS TRIP  
18 letter. The **Kataroff** case in the D.C. Circuit.

19 So the plaintiffs have a number of suggestions. That  
20 because there may be multiple agencies involved, a petitioner  
21 might be left with no grounds to really -- the appellate court  
22 would be left with no grounds to review the decision. But  
23 ultimately the Government would come forward with a record to  
24 justify its conduct and its decision in the matter, just --

25 THE COURT: Or not.

1 MS. KELLEHER: Or not. And simply -- if not, take the  
2 risk that the petition would be granted.

3 But in the **Kataroff** case, which -- where he  
4 received -- Mr. Kataroff received a letter identical to some of  
5 the letters that the plaintiff -- the Latif plaintiffs have  
6 received, the certified index of record has been filed. It  
7 lists over 100 things. And the parties will be free to -- to  
8 get into the merits of -- of that petition before the D.C.  
9 Circuit.

10 THE COURT: All right. So in summary, the Motion to  
11 Dismiss the complaint on the grounds of the lack of subject  
12 matter jurisdiction should be granted because?

13 MS. KELLEHER: DHS TRIP is a redress process that is  
14 specifically within TSA's statutory obligations.

15 It -- the DHS TRIP letters that are sent out are final  
16 orders of the TSA, because they definitively resolve the DHS  
17 TRIP complaint, and they are based on an administrative record  
18 related to review of that complaint.

19 THE COURT: Is there a time limit for a traveler to  
20 challenge a DHS TRIP letter?

21 MS. KELLEHER: I believe it's 60 days, your Honor.

22 THE COURT: And is there a time issue in this case,  
23 relative to the filing of the complaint and those -- such  
24 issues?

25 For example, if theoretically this action was

1 dismissed on the subject matter jurisdiction grounds you were  
2 asserting, would that in fact leave the plaintiffs without any  
3 review?

4 MS. KELLEHER: You know, I don't know, your Honor. I  
5 haven't compared the filing of the initial complaint of June  
6 30th of 2010 with the dates that the plaintiffs all received  
7 their TRIP letters.

8 I know that when the complaint was filed, some but not  
9 all of the plaintiffs had received their TRIP letters. Some  
10 received them after --

11 THE COURT: After the --

12 MS. KELLEHER: After the filing. So I would think  
13 there would probably be a tolling argument, which might be  
14 available while this action was pending, but I don't know, your  
15 Honor. I haven't compared the dates.

16 THE COURT: All right. Then on that Motion to Dismiss  
17 single ground -- are you finished? I'm sorry, Counsel.

18 MS. KELLEHER: Yes, your Honor.

19 THE COURT: Okay. Go ahead, Counsel.

20 MR. WIZNER: Thanks, your Honor. Just a few points.

21 Your Honor asked an extremely important question:  
22 Whose decision is it?

23 And the answer to that is found in the Government's  
24 own declarations, in the Piehota declaration. Mr. Piehota is  
25 with the Terrorist Screening Center.

1 He says --

2 THE COURT: Would you spell that name, please.

3 MR. WIZNER: P I E H O T A.

4 THE COURT: Thank you.

5 MR. WIZNER: There are two declarations from  
6 Mr. Piehota. I'm referring to the first one.

7 He said that the Terrorist Screening Center, the  
8 defendant in this case, is the final arbiter of an individual's  
9 watch list status.

10 It may well be that there are other agencies that  
11 participate in this process. But it's the Terrorist Screening  
12 Center that is the final arbiter. It decides if you're put on  
13 the list. It decides if you can be taken off the list. It  
14 transmits that information to other agencies that enforce it.  
15 But it's the Terrorist Screening Center that is the ultimate  
16 decision maker in this case. And that's not me saying that.  
17 That's the Government saying that in a sworn declaration.

18 Ms. Kelleher distinguished this case from **Ibrahim** by  
19 saying that **Ibrahim** was backward-looking and this case is  
20 forward-looking. But in fact, as the Court of Appeals  
21 described Ms. Ibrahim's complaint, she sought -- and I'm  
22 quoting -- an injunction to remove her name from the No Fly  
23 List. So there certainly was some prospective injunctive  
24 relief that was sought in that case.

25 And I -- although I do think it is possible to

1 distinguish this case from **Ibrahim**, if one is determined to do  
2 so, I don't think that Judge Kozinski would expect this case to  
3 be filed in the Court of Appeals after his decision.

4 In describing the DHS TRIP letters, Ms. Kelleher  
5 stated why she believes that those letters are a definitive  
6 statement of the agency's position, even if they don't  
7 communicate that result to the complainant herself.

8 But I would say again that -- that in no case that the  
9 defendant cited, or that I have located anywhere, has a letter  
10 been determined to be an order. If it was written by an entity  
11 that didn't have the --

12 THE COURT: The judge in the Eastern District of  
13 Pennsylvania did, didn't he?

14 MR. WIZNER: Except for the **Scherfen** case.

15 THE COURT: Well, don't say no case.

16 MR. WIZNER: I shouldn't say no case. In the **Scherfen**  
17 case, the judge in that case was persuaded by the dissent in  
18 **Ibrahim**. You are right.

19 THE COURT: I am simply trying to be sure I had  
20 correctly read that case. Because when a lawyer tells me no  
21 case, and I remember one that might be within the no-case  
22 universe, I wanted to be sure I didn't remember it wrong.

23 MR. WIZNER: It's one of my New Year's resolutions to  
24 be more precise in my language, your Honor, so thank you.

25 THE COURT: So other than that case.

1 MR. WIZNER: Other than that. And moreover, again,  
2 DHS has described itself as primarily a consumer of watch lists  
3 information. That that's not the language of an entity that is  
4 the decision maker here.

5 THE COURT: Now, I'm sorry. Which entity is the  
6 consumer?

7 MR. WIZNER: The Department of Homeland Security, of  
8 which TSA is a part.

9 That really is the TSC, which is operated by the  
10 F.B.I., that is the decision maker. And it's the Department of  
11 Homeland Security and the TSA -- and we cite to this in our  
12 brief -- where they've described themselves as a consumer of  
13 this.

14 If the Court were to determine that a DHS TRIP letter  
15 actually is an order -- although we believe that it doesn't  
16 meet the test for an order under the case law construing 46110.  
17 But if the Court determines that it is an order, we would  
18 submit that under **Ibrahim**, it's an order of the TSC and not an  
19 order of the TSA, for the reasons I stated.

20 Ms. Kelleher again rightly pointed to the -- to the  
21 fact that Congress has attempted to assign responsibility for  
22 redress to DHS and to the TSA.

23 But I would just point out that the Government made  
24 precisely that observation and argument to the Court of Appeals  
25 in **Ibrahim**.

1 And, in fact, I looked at the Government's brief in  
2 that case. It's at 2007 Westlaw 1511928, at pages 13 and 14.

3 The Government made that argument, that although TSC  
4 may be mostly responsible, TSA is involved, other agencies are  
5 involved as well. And Congress said that TSA had  
6 responsibility.

7 The majority of the Court of Appeals rejected the  
8 argument in that case. Judge Smith, in dissent, essentially  
9 formed his dissent around that very argument.

10 So I don't think that it's open to the Government to  
11 press that argument or for the Court to rule on that basis.

12 THE COURT: May I interrupt you there and ask for  
13 Ms. Kelleher's thoughts on that particular point.

14 MS. KELLEHER: Yes, your Honor.

15 In that, I would say that in **Ibrahim** the Government  
16 was relying on the TSA's general responsibilities for aviation  
17 security, whereas here we have a specific statute that Congress  
18 has told TSA to establish a procedure to enable airline  
19 passengers who are delayed or prohibited from boarding a flight  
20 because the advanced passenger prescreening system determined  
21 that they might pose a security threat, to appeal such  
22 determination and correct information --

23 THE COURT: What are you quoting from?

24 MS. KELLEHER: That is 49 USC --

25 THE COURT: 49 USC.

1 MS. KELLEHER: 44903.

2 And so I would say here we have an incredibly specific  
3 statute that is essentially right on point with the claims as  
4 alleged by the plaintiffs in their complaint.

5 And in **Ibrahim** there was a -- the argument was more  
6 about the general responsibilities of TSA for aviation  
7 security, and the fact that they, at that point, transmitted  
8 the No Fly List to the airlines.

9 THE COURT: And while you're on your feet,  
10 Mr. Wizner's point that **Ibrahim** also involved a request that  
11 she be removed from the No Fly List, and he was distinguishing  
12 your argument about backward-looking/forward-looking based on  
13 that additional remedy she was seeking.

14 MS. KELLEHER: Yes, your Honor. She -- she did seek  
15 injunctive relief. I think had she only sought damages, she  
16 would have needed to go to the Court of Claims. So her  
17 requested relief was removal from the list. But her requested  
18 relief was not a reevaluation of the existing redress process.

19 And -- and more to the point in **Ibrahim**, there were no  
20 DHS TRIP letters sent to Ms. **Ibrahim**.

21 Essentially the argument about TSA's responsibility  
22 stemmed from their general obligation to ensure the safety and  
23 security of our nation's aircrafts.

24 Here we not only have 49 USC 44903, a specific  
25 statute, but we have specific DHS TRIP letters that were sent



1 to all of the plaintiffs.

2 So that's where I would make -- see --

3 THE COURT: So the Government's position is, in short,  
4 the process the plaintiffs are due is encapsulated in the DHS  
5 TRIP process?

6 MS. KELLEHER: Yes, your Honor.

7 THE COURT: And, by statute, the only redress from  
8 that, if they're not satisfied with the process, is to go to  
9 the Court of Appeals in the District of Columbia?

10 MS. KELLEHER: Exactly, your Honor. To take their DHS  
11 TRIP letter. And to the extent they would like to argue that  
12 not only was whatever outcome from the redress either justified  
13 or not justified, but that the entire process itself, as  
14 Mr. **Gilmore** argued in his case to the identification  
15 requirements, that the process is not sufficiently transparent  
16 and does not comport with due process. They're free to make  
17 those arguments --

18 THE COURT: Did the Ninth Circuit send Mr. **Gilmore**  
19 there to do that?

20 MS. KELLEHER: They did, your Honor. I don't think he  
21 met with success on those claims, but they did entertain them,  
22 as -- that they were inextricably intertwined with his  
23 challenge to --

24 THE COURT: Well, we know what Judge Kozinski thinks  
25 about that language, so we're not going to use that as an

1 argument.

2 MS. KELLEHER: Yes. And he did, I think, try to sort  
3 of save the **Gilmore** case by saying that the issue was that  
4 inextricably intertwined is acceptable when you're talking  
5 about the claims that are being put forth by the plaintiff.

6 THE COURT: As opposed to something that might be  
7 intertwined with an order, whatever that is?

8 MS. KELLEHER: Exactly. Yes, your Honor.

9 THE COURT: All right. Okay. Mr. Wizner, I  
10 interrupted you, and I appreciate the indulgence.

11 MR. WIZNER: I'm almost finished, your Honor.

12 But just to respond to the point about Congress. You  
13 know, this case challenges the redress system that exists, not  
14 the one that Congress said should exist.

15 And it may be that Congress contemplated TSA having a  
16 larger role, where TSA could -- in the words Ms. Kelleher  
17 used -- correct any errors.

18 But the only correction that TSA is doing is at the  
19 instruction of the entity that actually has decision making  
20 authority.

21 It wasn't Congress that dictated that the Terrorist  
22 Screening Center should be responsible. That was a decision of  
23 the executive branch, to -- to assign responsibility among the  
24 various agencies and entities that are responsible for this.

25 Congress may very well have wished for a different

1 arrangement, but we are challenging the process as set forth in  
2 the declarations of the defendants. That's process that  
3 exists, and the statutory language doesn't change that.

4 And finally, your Honor, about petitioning the Court  
5 of Appeals, what --

6 THE COURT: For the District of Columbia.

7 MR. WIZNER: Well, I -- is it only the District of  
8 Columbia, or could it be any court of appeals now?

9 MS. KELLEHER: I think, your Honor, the plaintiff must  
10 be present, which is why Mr. **Gilmore** was in the Ninth Circuit,  
11 the San Diego helicopter --

12 THE COURT: I must have misread that. I thought it  
13 was one of those limited courts of appeal.

14 MS. KELLEHER: I believe it's essentially where the  
15 petitioner resides.

16 MR. WIZNER: So it would be --

17 THE COURT: You're going to endear me to those  
18 colleagues yet one more time.

19 MR. WIZNER: Well, better than sending me to their  
20 colleagues in the D.C. Circuit.

21 THE COURT: Thank you for correcting me.

22 MR. WIZNER: But, again, about -- about that petition  
23 to the Court of Appeals, who exactly should invoke the Court of  
24 Appeals' jurisdiction?

25 Under the current system, the answer would have to be

1 everyone who has gone through DHS TRIP. Because even if, as  
2 they say, more than 90 percent of the people who submit those  
3 petitions were never on watch lists in the first place and even  
4 if some other percentage of those people were successful in  
5 their petition for redress, they would have no way of knowing  
6 that, because they're going to get the same or substantially  
7 the same letter from TSA that says we either did or didn't take  
8 any action in this case.

9           You would then have thousands of petitions to the  
10 Court of Appeals saying, I either am or I'm not on the No Fly  
11 List. I haven't been given any evidence. I haven't seen any  
12 record.

13           And I -- again, in none of the cases that are  
14 construing this jurisdictional statute or its predecessor did  
15 you have a situation where the putative order in question did  
16 not state the agency's position in a way that would allow the  
17 petitioner to know even whether to appeal, leaving aside what  
18 to appeal.

19           So at a minimum -- at a bare, bare minimum -- the  
20 petitioner should know whether their administrative redress has  
21 been successful.

22           We contend that the Constitution requires considerably  
23 more than that. They would need to have some basis for knowing  
24 what it is that they're challenging.

25           And this record, that goes to the Court of Appeals,

1 are a bunch of documents assembled by the Government alone.  
2 And I suppose anything that the petitioner wants to submit --  
3 but, again, in response to nothing; not knowing why the  
4 Government has placed him in that position.

5 So I do think that certainly there's no case other  
6 than **Scherfen**, that has been cited to this Court, in which this  
7 kind of scheme has constituted a final order that is appealable  
8 exclusively to the Court of Appeals.

9 Thank you.

10 THE COURT: Okay. Let's take about a ten-minute  
11 break. And then we'll focus on this motion to -- Motion to  
12 Strike and next steps.

13 I want the parties to know that, as I indicated in our  
14 earlier telephone conferences, I have not reviewed, looked at,  
15 or considered in any way any of the ex parte materials that  
16 have been submitted.

17 They went into a safe place, a SKIF. And they're  
18 sitting there, and they remain there. So to the extent I've  
19 been arguing with you today or considering your arguments, it's  
20 based only on the -- the legal assertions. And if there comes  
21 a time when, in the processing of this Motion to Strike, you  
22 come to a place where you expect me to be looking at those  
23 things, then we'll change that status.

24 But right now, I'm still in the "I haven't looked at  
25 them yet" part. So I want to be sure you're all aware of that.

1           Okay. Ten minutes, please.

2           (Recess taken.)

3           THE COURT: Mr. Wizner, I would like to go back to  
4 **Ibrahim**, if you don't mind.

5           MR. WIZNER: I don't mind, your Honor.

6           THE COURT: And if you have a copy of the case, the  
7 actual case?

8           MR. WIZNER: I do, your Honor (indicating).

9           THE COURT: All right. I can orient you best by  
10 referring to headnote numbers.

11           In -- under headnote 1, before you get to headnote 2,  
12 before -- before footnote 9. In fact the sentence that's  
13 immediately preceding the flag for footnote 9.

14           The -- that reads, quote: The No Fly List is  
15 maintained by the Terrorist Screening Center, and  
16 Section 46110 doesn't apply to that agency's  
17 actions. The district court therefore retains  
18 original jurisdiction over Ibrahim's APA claim,  
19 regarding placement of her name on the No Fly List,  
20 pursuant to 28 USC Section 1331.

21           All right. See that statement?

22           And then in several lines, under headnote 2, is the  
23 concluding sentence of that paragraph B, which is captioned,  
24 "Policies and Procedures Implementing the No Fly List."

25           That concluding sentence reads, Therefore, Section

1           46110 stripped the district court of jurisdiction  
2           it would otherwise have had over Ibrahim's APA  
3           claim regarding the Government's policies and  
4           procedures implementing the No Fly List.

5           MR. WIZNER: I think that's a typo, your Honor. And I  
6 think that the Court meant to -- meant **Gilmore's**, in context.

7           (Pause, referring.)

8           MR. WIZNER: Or maybe not. No.

9           THE COURT: I don't think it's a typo.

10          MR. WIZNER: No, maybe not.

11          THE COURT: Here's what I'm thinking.

12          MR. WIZNER: Let me read this.

13          (Pause, referring.)

14          THE COURT: I think those are two distillations of the  
15 spectrum of jurisdiction, at least in the Ninth Circuit and as  
16 to which I'm beholden.

17                I propose -- what -- what I'm having difficulty with  
18 is what I began the afternoon with, and that is trying to sort  
19 out precisely from the record that has been superseded by  
20 events, specifically the plaintiffs' complaint, what part of  
21 plaintiffs' -- now -- two claims that are really of concern may  
22 involve placement of their names on the No Fly List. In which  
23 case, Judge Kozinski says clearly Section 46110 doesn't apply.

24                And which parts of plaintiffs' claims involve the  
25 Government's policies and procedures implementing the No Fly

1 List, in which case I don't have jurisdiction.

2 And what I'm suggesting --

3 MR. WIZNER: (Nods head.)

4 THE COURT: -- is this. I think the plaintiffs should  
5 file an amended complaint, especially with these two  
6 standards -- opposing standards in mind. So that I can tell  
7 exactly what the claims are that plaintiffs are asserting, and  
8 I can seek to apply binding Ninth Circuit precedent under also  
9 the Rule 12 standards of **Iqbal** and the Rule of Procedure 8, and  
10 come to a decision about whether plaintiffs' claims do or do  
11 not fall at one end or the other of this jurisdictional  
12 continuum.

13 And in that process I think I will be better able to  
14 determine if I am dealing with an order of the TSA or something  
15 else.

16 These -- these standards, from Judge Kozinski's  
17 analysis, have to be squared with the plaintiffs' allegations.  
18 They're two declaratory sentences about whether the district  
19 court does or doesn't have jurisdiction.

20 And I'm not suggesting you plead them, but I'm saying  
21 that they are real articulations the Court will have to take  
22 into account in evaluating whether I have jurisdiction or I do  
23 not have jurisdiction. Whether your arguments about due  
24 process, in other words, are in fact arguments about policies  
25 and procedures implementing the fly list, such that I don't



1 have jurisdiction to consider your complaints on your client's  
2 behalf; or whether your arguments about due process are more in  
3 the nature of placing or removing names from the No Fly List,  
4 such that a -- aligned with Judge Kozinski's decision there,  
5 the matter was to be developed by the trial court.

6 Do you see what I'm saying?

7 MR. WIZNER: I do, your Honor. And I would just say  
8 that I think -- I read this to mean something slightly  
9 different.

10 That Judge Kozinski is not necessarily being as  
11 precise as you are about the distinction between placement and  
12 removal. I think that he's referring to a watch list status.

13 THE COURT: Well, what I'm seeing very precisely,  
14 however, is that he explicitly said the district court would  
15 not have jurisdiction over claims regarding the Government's  
16 policies and procedures implementing the No Fly List. And the  
17 way you've been arguing about process and the redress system  
18 seems driftingly close to that.

19 MR. WIZNER: I don't think so, your Honor.  
20 Respectfully, I think that the policies and practices  
21 implementing --

22 THE COURT: This is why I'm giving you a chance to  
23 file an amended complaint, to be explicit about what claim  
24 actually is being advanced, and pleaded in a way that can be  
25 clear from the face of the complaint in a concise way.

1 I can then make a determination as a matter of law,  
2 from the face of the complaint, as to whether Section 46110  
3 closes the door for your clients in this court or not. I think  
4 that needs to happen, in lieu of my ruling on the Motion to  
5 Dismiss.

6 MR. WIZNER: We're very willing to file an amended  
7 complete.

8 THE COURT: I wouldn't snatch defeat from the jaws of  
9 victory, if I were you.

10 You're trying hard to articulate a place where your  
11 claims survive in the district court. And I'm having an  
12 ongoing problem holding onto that, because it is an illusive  
13 kind of argument, when I go back to the complaint and I try to  
14 evaluate what you're telling me in the face of the allegations  
15 of the complaint. It is the complaint that is the operative  
16 document. It is a Motion to Dismiss that complaint on  
17 jurisdictional grounds. And the very first obstacle that has  
18 to be addressed in a principled way is the **Ibrahim** decision,  
19 and the Court's declarations about what the district court did  
20 have power to do and didn't have power to do.

21 And I think the plaintiffs need to face up to that and  
22 plead concisely what it is that they contend brings them within  
23 the district court's jurisdiction and pleads away from a claim  
24 that involves policies and procedures implementing the No Fly  
25 List. Because that's what I think Judge Kozinski clearly said

1 was one basis for the court not to have power to proceed.

2 So willingness isn't really an option. You may not  
3 want me to rule on this motion on this record.

4 MR. WIZNER: Right. I am not actually trying to  
5 snatch defeat from the jaws of anything. I just want to be  
6 clear about what it is that we need to plead when we --

7 THE COURT: Well, I don't know what you need to plead,  
8 because I don't know what you're pleading.

9 I continue --

10 MR. WIZNER: Right.

11 THE COURT: -- to be challenged, as I know all of us  
12 are, by where the line is.

13 But jurisdiction comes first, and I have to be able to  
14 articulate that there is a claim. I have the authority to  
15 require the defendants to answer in this Court. At least to  
16 the next step.

17 And I can't principally -- I can't do that in a  
18 principled way, based on the complaint that I have and based on  
19 these particular references to **Ibrahim**, which I'm bound to  
20 follow.

21 MR. WIZNER: Right.

22 THE COURT: And so I think what plaintiffs need to do  
23 is to file a new complaint.

24 You could, for example, withdraw without prejudice  
25 those claims you think aren't any longer necessary or not.

1 But whatever it is you do, it needs to be not 90 pages  
2 worth of evidence but an articulation of the specific two  
3 claims, or more, that you want to parse out within -- among  
4 other things -- these two standards.

5 MR. WIZNER: I -- I understand, your Honor. What we  
6 have difficulty with is that we don't know what the Court is  
7 referring to when it uses the term "policies and procedures."

8 And the reason why we don't know that is that if you  
9 look at footnote 10, Judge Kozinski writes:

10 The precise policies and procedures are not known  
11 to **Ibrahim** or to us, because the security  
12 directive -- directive is sensitive security  
13 information.

14 So --

15 THE COURT: Well, it doesn't matter that you don't  
16 know.

17 MR. WIZNER: No, it does, though.

18 THE COURT: All we know for sure is that if the claim  
19 involves policies and procedures implementing the No Fly List,  
20 it's a no-go here. That's what we know from this case.

21 I do not have the power to let you go forward if your  
22 claim comes within that ambit. That's what this says.

23 MR. WIZNER: Right. And what I think is significant  
24 about this footnote is that it gives us a frame for what is  
25 meant by the term "policies and procedures," that distinguishes

1 it.

2 THE COURT: And I'm inviting you to articulate your  
3 claim in a way that excludes the proximity of your argument  
4 from that -- that line, which you cannot cross.

5 Because if we are in a claim about policies and  
6 procedures implementing the No Fly List, if in fact the redress  
7 process is a policy and procedure implementing the No Fly List,  
8 then the district court doesn't have jurisdiction, and that's  
9 the end of your case here.

10 If you have a claim that's different than a claim  
11 regarding policies and procedures implementing the No Fly List,  
12 you need to articulate it in a way that makes clear I have  
13 jurisdiction.

14 And I think part of the process is simply to boil it  
15 down to your contention that it is the TSC. You simply make  
16 the allegation of the ultimate fact. The TSC is the decision  
17 maker that includes your clients on the list, if they're on the  
18 list. They do that without notice, without process, and  
19 without an opportunity. I don't know what your claim is.

20 MR. WIZNER: Well, that is actually in our complaint,  
21 what you just recited.

22 THE COURT: Well, in 90 pages, I say again with  
23 respect -- now, I'm not going to argue with you, Counsel. If  
24 you don't want an opportunity to amend, fine. I'll rule on the  
25 record. But I can tell you you are not making it any easier

1 for this claim to go beyond a dismissal.

2 It is extraordinarily difficult to take what you're  
3 arguing in theory and apply it to the standard from this  
4 document.

5 Now, do you want an opportunity or not?

6 MR. WIZNER: We do, and we will.

7 Again, I do think that we're going to have a  
8 difficulty, only insofar as because the policies and procedures  
9 are sensitive security information. We don't know what they  
10 are.

11 THE COURT: Look, if you want to litigate in the  
12 district court, you have to articulate a claim that is outside  
13 the ambit of Section 46110, in a concise way, consistent with  
14 Rule 8, and in a manner that allows me to process the claim  
15 despite **Ibrahim**.

16 Your current complaint does not affirmatively make  
17 that clear.

18 It is your obligation, as the pleading party, to show  
19 I have jurisdiction. You haven't.

20 Now, if you want an opportunity to do it, you may have  
21 it, and I won't formally rule on the motion. That's really  
22 where we are.

23 A party needs to make clear the jurisdictional basis  
24 of his, her, or their claim.

25 You have a very difficult problem, given the nature of

1 this serious dispute, but you have to articulate it. And  
2 throwing 90 pages of evidence, with conclusions, doesn't do it  
3 in this circuit.

4 So take your pick. I'll take the Motion to Dismiss  
5 under advisement. Or, instead of that, I'll give you an  
6 opportunity to replead and give the Government a brief  
7 opportunity to file a supplemental memorandum in support of a  
8 Motion to Dismiss, against a replead complaint, with a reply  
9 opportunity by you.

10 Those are our routes on the Motion to Dismiss part of  
11 that big omnibus motion you filed.

12 How do you want to proceed?

13 MR. WIZNER: We accept your invitation, your Honor, to  
14 file an amended complaint.

15 THE COURT: How much time do you want to do that?

16 Today is the 21st of January.

17 MR. WIZNER: Two weeks will be sufficient, your Honor.

18 THE COURT: And how much time would the Government  
19 want to file a supplemental memorandum in further support of  
20 the jurisdictional aspect of the motion?

21 MS. KELLEHER: Could your Honor remind me? I don't  
22 have my calendar in front of me. Where that -- the two weeks  
23 from --

24 THE COURT: Two weeks from today is February 4.

25 MS. KELLEHER: I think two weeks would be fine, your

1 Honor.

2 THE COURT: February 18th.

3 And then a reply. Do you want one week, two weeks?

4 MR. WIZNER: Two weeks, please, your Honor.

5 THE COURT: March 4.

6 So with respect -- excuse me just a moment.

7 (Pause, referring.)

8 THE COURT: To that part of Motion No. 43, which is a  
9 Motion to Dismiss for lack of subject matter jurisdiction, the  
10 Court defers ruling on the motion pending the filing of a  
11 Second Amended Complaint by the plaintiffs, no later than  
12 February 4; which complies with Rule 8 and which sets forth  
13 the -- clearly, the nature of the claims proposed and a  
14 jurisdictional basis for the claims in light of the  
15 jurisdictional challenge under Section 46110.

16 I want -- I want you to do what you can to articulate  
17 how a claim or claims -- your APA claim, your due process  
18 claim, whatever claims you're going to proceed with, fit a  
19 district court jurisdictional analysis in light of Section  
20 46110 as interpreted by the Ninth Circuit, because that's where  
21 you chose to sue. Okay? February 4.

22 Supplemental memorandum, in further support of that  
23 part of Document 43, that is a jurisdictional motion to  
24 dismiss, is due February 18; a reply, March 4. And I will take  
25 that part of the motion under advisement on March 4, without



1 any additional oral argument.

2 Now, was there something else on that you wanted to  
3 talk about?

4 MR. WIZNER: No, your Honor.

5 THE COURT: Okay. Let's talk about this Motion to  
6 Strike, and whether it has status now or not.

7 I was a bit confused by the correspondence you sent.  
8 I'm not sure it really resolves anything.

9 Who wants to talk to me about that?

10 MS. CHOUDHURY: Your Honor, I'm happy to address that  
11 issue. Apologies if there was anything confusing in the  
12 parties' joint letter.

13 THE COURT: Well, what it sounded like to me was we  
14 don't really need to you rule on the Motion to Strike, so long  
15 as you can rule on the Motion for Summary Judgment without  
16 looking at any of those materials.

17 But if you want to look at those materials, you could,  
18 because we think we win the Motion for Summary Judgment anyway,  
19 regardless of what's in those materials.

20 Which sounded to me like a pretty circular argument.

21 And if -- if people really don't care about those  
22 materials, either withdraw them -- withdraw them. If you care  
23 about them, then they need to be dealt with appropriately in  
24 the record.

25 So I'm -- I am confused about what it is the status is

1 of the Motion to Strike.

2 MS. CHOUDHURY: Your Honor, the defendants' opposition  
3 to that motion provided some of the first characterizations of  
4 what's in the ex parte material. So it changed the plaintiffs'  
5 position with respect to our understanding of what's in them  
6 and their potential impact on the -- what will be, if the Court  
7 proceeds past a Motion to Dismiss stage, cross-motions for  
8 summary judgment in this case.

9 Plaintiffs believe that even if the Court looks at the  
10 ex parte materials, that there is a chance that we will -- and  
11 we are confident that we will prevail on those cross-motions  
12 for summary judgment.

13 And in speaking and conferring with the defendants, it  
14 appeared clear from their opposition, as well as during our  
15 conversations, that they're -- they're confident as well, that  
16 if the Court does not review the submissions, that they may  
17 prevail as well.

18 THE COURT: So are you withdrawing the Motion to  
19 Strike?

20 MS. CHOUDHURY: At this point, your Honor, no, we are  
21 not withdrawing.

22 What we would like the Court to do is to proceed --  
23 you know, assuming, of course, that the Court proceeds past the  
24 Motion to Dismiss, with the cross-motions for summary judgment  
25 and to review those motions, to look at them. And if the Court

1 deems that something in the ex parte materials is material and  
2 dispositive of those motions, to then schedule a status  
3 conference, so that we may address whether or not there are  
4 issues, due process concerns that we raise in our motion and  
5 would then address at that time.

6 Your Honor, in conferring with our clients, we, you  
7 know, consulted with them and are very concerned that orders  
8 issued in response to the motion to resolve some of the issues  
9 that may not in fact be material, when the Court looks at the  
10 Motions for Summary Judgment, may be the subject of  
11 interlocutory appeals.

12 THE COURT: Here's what I think we need to do.

13 The summary judgment record either needs to be  
14 considered by the Court on the same playing field for everyone  
15 to its logical conclusion, or not.

16 If the Government is satisfied that the summary  
17 judgment record it's made, without reference to ex parte  
18 materials, is sufficient to allow it to obtain summary  
19 judgment, that's the record we should use. Then the plaintiffs  
20 are not at any disadvantage. Plaintiffs have exactly the same  
21 information as do defendants and the Court. And the Court  
22 isn't colored in any way, even inferentially, by reference to  
23 material that the plaintiffs haven't been able to consider.

24 It's only if, going through that process, the  
25 defendants would contend more information might change the

1 analysis, that it would seem to be warranted to go into the  
2 process of dealing with protected information.

3 I've been frustrated, because I think you all have  
4 complicated the procedures in this case significantly by  
5 rushing into a combined Motion to Dismiss and for summary  
6 judgment before we've even settled on, as noted, the  
7 sufficiency of the plaintiffs' complaint.

8 So I think we're a bit of a cart before the horse  
9 here, since I still don't even know if I have jurisdiction.

10 But with respect to the summary judgment part of  
11 Motion 43, I don't know if the Government thinks that's still a  
12 viable motion on the record it presented, because you all  
13 haven't yet responded, or not.

14 This is the problem with charging forward on multiple  
15 fronts before things settle.

16 So I don't think it is at all appropriate to leave it  
17 to the Court to decide unilaterally whether something's  
18 important or not, because there are very significant interests  
19 at stake here for everyone.

20 And if -- it ought to be the party who wants the Court  
21 to consider the material, who makes the case that it's  
22 necessary to do that.

23 So my strong preference is for the moving party to  
24 decide whether that material's necessary or not. If it's not,  
25 then we shouldn't have a problem. We should all be able to

1 deal with the same record.

2 If it is, then we need yet another process to get in  
3 the middle of the merits here, and that's a process to deal  
4 with the process.

5 Counsel.

6 MS. POWELL: To be very clear about the Government's  
7 position, we do think we can prevail on the public record as it  
8 is, recognizing that the plaintiffs disagree and that the Court  
9 could -- we think it makes the most sense for the Court to have  
10 the benefit of those materials --

11 THE COURT: I disagree, and I'm not going to do it.

12 I am not going to go through a -- a process where I  
13 have to anticipate objections, when the other side hasn't even  
14 figured it out yet.

15 If you contend you're entitled to summary judgment on  
16 a record that they may see, then we're going to go through that  
17 process first.

18 MS. POWELL: One last bit, then. It could put the  
19 Court in the awkward, perhaps impossible position of having to  
20 make an advisory position -- opinion of what its --

21 THE COURT: No. No, no, no.

22 Motion for Summary Judgment puts the burden on the  
23 moving party to show that the facts are undisputed, and you're  
24 entitled to judgment as a matter of law.

25 If you have undisputed facts that are disclosed to the

1 plaintiff and there isn't an issue of material fact, we go  
2 right to the legal arguments, and the record is plain and easy  
3 for an appellate court to review.

4 MS. POWELL: Right.

5 THE COURT: If you contend there are facts that are  
6 material, that can't be disclosed to the plaintiff, that's a  
7 different motion.

8 You can't have it both ways, and I'm not going to take  
9 on the responsibility of trying to infer whose interests are  
10 being gored based on the evaluation of one piece of evidence or  
11 another.

12 MS. POWELL: Your Honor -- I'm sorry.

13 THE COURT: So if the Government -- I think the  
14 Government, first of all, needs to reevaluate its summary  
15 judgment record after this amended complaint gets filed and  
16 after we determine, first of all, is there jurisdiction.

17 If I conclude there's jurisdiction and we then have a  
18 complaint that -- that clearly -- because a complaint  
19 articulates a jurisdictional ground, then the Government needs  
20 to figure out whether its existing summary judgment motion can  
21 stand or it needs to reformat or refocus it, depending on where  
22 the plaintiffs have gone. Because you moved for summary  
23 judgment before the plaintiffs were even out of the gate. The  
24 record is narrowing and narrowing and narrowing.

25 I am not going to take on a responsibility to try to

1 segregate information in my mind between what the plaintiffs  
2 have seen and what they haven't seen, and then try to  
3 anticipate their responsive argument to material they haven't  
4 seen, if that's not necessary.

5           So I think the appropriate way to go is for -- first  
6 of all, for us to finish this jurisdictional process.

7           Secondly, for the Government then to -- the Government  
8 defendants to decide whether it wants to live with the summary  
9 judgment motion it filed. And, if so, it's going to need to  
10 make clear the bases for the motion, without reference to  
11 material that's not available to the plaintiff.

12           MS. POWELL: I'm sorry --

13           THE COURT: And then --

14           MS. POWELL: Go ahead.

15           THE COURT: -- and only then -- if the only basis on  
16 which the Government contends it can prevail is for the Court  
17 to take on the Classified Informations Procedures Act  
18 processes, and all of those other issues that have to do with  
19 protected or ex parte information, then we'll do that.

20           MS. POWELL: Your Honor, we're certainly happy to go  
21 forward as you suggest, in terms of dealing with the  
22 jurisdictional issues first. And --

23           THE COURT: Well, you know what? You don't get a  
24 choice. Jurisdiction is first. I can't -- I can't rule on --

25           MS. POWELL: I know -- I know, your Honor. I was -- I

1 was merely attempting to make clear what our position's likely  
2 to be. I don't want to surprise the Court later.

3 THE COURT: Let's start over.

4 What is it you want?

5 MS. POWELL: Your Honor, we can proceed as you suggest  
6 and deal with jurisdictional issues first, without objection  
7 from the Government.

8 THE COURT: We have to deal with the jurisdictional  
9 issue first.

10 MS. POWELL: I understand.

11 THE COURT: There isn't any one of us who has the  
12 power to avoid it. Jurisdiction first.

13 Once jurisdiction is decided, then what?

14 MS. POWELL: The Government will move for summary  
15 judgment --

16 THE COURT: You have moved for summary judgment.

17 MS. POWELL: I understand, your Honor.

18 THE COURT: I'm asking --

19 MS. POWELL: On the current -- sorry. Go ahead.

20 THE COURT: You see the problem is the record is hard  
21 to manage because of the Government's initial decision of this  
22 conjoined motion, very early, before the plaintiffs' theories  
23 had even been clearly identified, before these other -- this  
24 other relief was resolved, as to the people who were waiting  
25 outside of the U.S. to come in, and so forth.



1           Here -- you have to decide whether the Motion for  
2 Summary Judgment you originally filed is fine in its form. And  
3 if there's a way I can review it, without having to look at ex  
4 parte material. You have to decide whether that's possible.

5           If it is, and your existing record is okay, then  
6 they'll respond to it, and we will go through a regular  
7 process, and I'll determine, are there issues of disputed fact  
8 or not?

9           If not, are you entitled to judgment as a matter of  
10 law?

11           MS. POWELL: It is possible, your Honor --

12           THE COURT: Pardon me?

13           MS. POWELL: I have a question for the Court, to make  
14 sure I understand the Court's position. Which is how would you  
15 like us to proceed if we believe, as we have put forward thus  
16 far, that the information is unnecessary but material?

17           In other words, relevant to the issues before the  
18 Court, such that the Court disagreed with us, it would need to  
19 look at those materials before ruling against --

20           THE COURT: I don't know, since I haven't tried to  
21 analyze your motion. So I -- I --

22           MS. POWELL: I could put forward to you our basis for  
23 filing the ex parte materials, if that would be helpful.

24           THE COURT: No, it wouldn't, because I haven't tried  
25 to evaluate why you're moving for summary judgment or how you

1 best can do that. I'm not an advocate here.

2 I'm trying to deal, first, with the most important  
3 issue, and that is, do we have jurisdiction in this court?

4 I'm very frustrated by the fact that that was  
5 intertwined with substantive motions that combined the  
6 additional problem of filing ex parte material, all of which  
7 drew all of the objections that are now on the table.

8 What I'm suggesting is we need to unpack some of this,  
9 so that we have a logical process going forward.

10 One option is for the Government to withdraw all of  
11 its motion, other than its motion -- other than its Motion to  
12 Dismiss for lack of jurisdiction, and let me rule on it. And  
13 once that's ruled on, to take a look at what remains.

14 If there is jurisdiction, then to evaluate the  
15 plaintiffs' real complaint, this Second Amended Complaint  
16 that's going to be a concise statement that makes clear what  
17 the jurisdictional basis is and makes clear what the APA and  
18 due process claims are they're pursuing.

19 MS. POWELL: Understood.

20 THE COURT: And then decide, does it want to move for  
21 summary judgment, or not?

22 And if it does, does it need -- does -- do you, as a  
23 moving party, need to rely on material they're not going to get  
24 to look at?

25 If you do, then we first ought to evaluate the

1 fairness of that process before you launch off on another round  
2 of motions.

3 MS. POWELL: I get -- I believe I understand your  
4 Honor. And we're happy to withdraw the Motion for Summary  
5 Judgment until such time as the Court decides the  
6 jurisdictional issue.

7 THE COURT: That's only -- I'm only suggesting that --  
8 you know, in a perfect world, what would have happened is you  
9 all would have come in after the first complaint -- after the  
10 first complaint was filed. And we would have talked about a  
11 series of motions that would have been logical in a  
12 progression. It wouldn't have caused people to file motions  
13 and oppositions that couldn't have been addressed.

14 There has -- there's just been a lot of diversion  
15 because of this process you launched into.

16 I appreciate the Government feels very strongly that  
17 the plaintiffs' claims need to be shut down. But there is a  
18 process for that too, and we can only do one step at a time.

19 MS. POWELL: Understood, your Honor.

20 THE COURT: I'm not saying the Government's motions  
21 have to be withdrawn. I'm simply saying I'm not going to  
22 address them prematurely. I'm also not going to address them  
23 in the first instance, based on information that the plaintiffs  
24 don't have, unless the moving party contends the only way  
25 they're entitled to summary judgment is by using information

1 not available to the plaintiff. In which case, before we get  
2 to summary judgment, we have to litigate the fairness of that  
3 process.

4 MS. POWELL: Understood, your Honor.

5 I suspect that what makes sense, should we get past  
6 these jurisdictional issues, that when the Government moves for  
7 summary judgment, it will -- would it make sense for the  
8 Government to also say that if the Court cannot decide this on  
9 the basis of the public record, we can offer additional ex  
10 parte submissions, and provide a basis for doing so?

11 Does that make sense, as a logical way to proceed?

12 THE COURT: No. It does not make sense to me that you  
13 put the Court in the position of assisting a party -- one party  
14 or the other in obtaining a result, and that's -- that's how  
15 I'm hearing you. Because you're suggesting I read the record  
16 in a way that says you don't win process A. But if you do  
17 process B, you will. You're the moving party.

18 You have to decide what information you contend you  
19 need for -- to prevail, if and when the record is ripe for  
20 summary judgment.

21 The other issue is a summary judgment that comes on  
22 the heels of a complaint being filed also precludes any  
23 opportunity for discovery, if there's going to be discovery; an  
24 evaluation of what other facts are out there.

25 I mean, if you all --

1 MS. POWELL: I think the parties -- I apologize. I  
2 thought you were done.

3 THE COURT: This really isn't advancing anything.

4 I'm simply explaining that right now the  
5 jurisdictional motion remains pending.

6 MS. POWELL: Understood, your Honor. We'll consult  
7 with our clients and reevaluate after the amended complaint is  
8 filed.

9 THE COURT: Okay. The motion, which is Docket No. 43,  
10 to the extent it concludes the alternative Motion for Summary  
11 Judgment, it's still out there.

12 What about this Motion to Strike, then, for the  
13 plaintiff?

14 MS. CHOUDHURY: Your Honor, the Motion to Strike, you  
15 know, will be withdrawn when the defendants withdraw the  
16 summary judgment portion of that motion.

17 THE COURT: All right. Well, then I'm not making any  
18 rulings on any of that, other than having set the schedule that  
19 I've set. And so I look forward to receiving an amended  
20 complaint. A hopefully concise supplemental memorandum that  
21 simply points out where the jurisdictional line is not met, and  
22 then a concise reply. And then we'll get through the  
23 jurisdictional piece. And if, in the meantime, the Government  
24 decides it wants to do something with those motions -- I  
25 shouldn't say "something."

1           The only thing I would like to hear about is if you  
2 decide to withdraw them, the remaining motions, in which case  
3 you'll withdraw your Motion to Strike.

4           If you don't want to withdraw them, that's okay.  
5 We'll work with what you've got. But we have to take it one  
6 step at a time.

7           MS. KELLEHER: Your Honor, if we were to withdraw  
8 them, would we simply file a notice informing the Court of the  
9 docket entries?

10          THE COURT: Right. Right.

11          MS. KELLEHER: Okay. And just, your Honor, in terms  
12 of -- I wanted to give some background, in terms of our  
13 including both the Rule 19 jurisdictional issue and the merits.

14          When we spoke with your Honor on the phone in August,  
15 we had understood that the -- generally the Court doesn't -- is  
16 not in favor of sort of motions that don't necessarily advance  
17 the case if they're denied.

18          And so we sort of have included both in the sense that  
19 if your Honor is unpersuaded by our jurisdictional argument,  
20 essentially, then the Court could proceed with the merits.

21          THE COURT: Well, you're probably used to dealing with  
22 way smarter judges than I.

23          MS. KELLEHER: No, your Honor --

24          THE COURT: There is only so much we can process.

25          Jurisdiction is clearly a very big deal here. And

1 it's not a very clear issue, given the case law and given the  
2 nature of what it is the plaintiffs are arguing and the  
3 defendants are arguing.

4 This has sort of overtaken everything, and we need to  
5 get this straightened out in a legitimate and careful way.

6 If the case continues, then we need to figure out  
7 what's next. Which is, are the plaintiffs entitled to  
8 discovery before they're put to the burden of having to answer  
9 a summary judgment motion, or not?

10 Or have you all decided that enough of the material  
11 facts are already well known and undisputed that you got that  
12 record, and now we're just going to go to do they have a claim?

13 MS. KELLEHER: We did have some of that back and forth  
14 with counsel.

15 THE COURT: I know you did. I know you did. It's  
16 just that you're trying to do too much simultaneously, and  
17 maybe you can do that with a smarter judge. This one can't.  
18 We're going to do it one step at a time.

19 I need to be confident that we have the authority to  
20 act, if we're going to get into any of that. And I also think,  
21 just as a matter of fairness, if we're going to have a process  
22 in which either party asks the Court to consider information  
23 not available to the other, that we have a process to ensure  
24 that's the only way we can go forward.

25 There are occasions when that happens. In the

1 criminal setting, it happens a lot. And it's a very  
2 uncomfortable place for the Court to be, because it does put  
3 the Court in the position of having to anticipate the  
4 counterarguments that an advocate would be making, when that  
5 advocate doesn't even know what it is that's being proffered.

6 So I far prefer the usual open and spirited process of  
7 the type we've been engaged in. And if we can process the case  
8 that way, great. If we can't, and I must engage in the review  
9 of ex parte material, I will. But only if we have to.

10 MS. KELLEHER: Well, we'll certainly take that back.  
11 And we apologize, to the extent the -- it seemed as if we were  
12 rushing the issues for the Court.

13 THE COURT: Everybody's anxious to get a decision.  
14 Unfortunately, it's a tough process that we have to take very  
15 carefully. These are important issues for everybody.

16 And I appreciate, Counsel, all of your work. Please  
17 don't take my earnest questions the wrong way. I want to be  
18 sure we get this right. I want to be sure we're in the right  
19 court when you litigate.

20 So let's -- let's take it -- this -- the next steps,  
21 and we'll do just that.

22 So all I -- the only order I'm entering today is  
23 plaintiff has leave to file a Second Amended Complaint,  
24 compliant with Rule 8, and that lays out a jurisdictional  
25 basis, so that I can continue to evaluate the jurisdictional



1 challenge on the Motion to Dismiss.

2 We'll do those two briefs, and then we'll go from  
3 there. Okay?

4 Anything else for this afternoon?

5 All right. Thank you. Safe travels for those of you  
6 who have come a distance.

7 We're in recess on this matter.

8 (Conclusion of proceedings.)

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15 I certify, by signing below, that the foregoing is a correct  
16 transcript of the oral proceedings had in the above-entitled  
17 matter this 31st day of January, 2011. A transcript without an  
18 original signature or conformed signature is not certified. I  
19 further certify that the transcript fees and format comply with  
20 those prescribed by the Court and the Judicial Conference of  
21 the United States.

22

23 /S/ Amanda M. LeGore

24

25 AMANDA M. LeGORE, RDR, CRR, FCRR, CE